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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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10 Deborah Caldwell,

11 Plaintiff,

12 vs.

13 J & J Rocket Company dba JP
14 Consultants,

15 Defendant.

No. CV-13-08043-PCT-PGR

ORDER

16 Pending before the Court is Plaintiff's Motion for Summary Judgment on Count
17 Two (Doc. 36), which is the plaintiff's Breach of Contract claim in her First Amended
18 Complaint. Having considered the parties' memoranda and the evidence of record
19 submitted by the parties, the Court finds that there are no genuine issues of material
20 fact and that plaintiff Deborah Caldwell's summary judgment motion should be
21 granted as a matter of law pursuant to Fed.R.Civ.P. 56.¹

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24 Although both parties have requested oral argument, the Court
25 concludes that none is necessary because the parties have had an adequate
26 opportunity to provide the Court with evidence and legal memoranda supporting their
respective positions and oral argument would not significantly aid the decisional
process. See Partridge v. Reich, 141 F.3d 920, 926 (9th Cir.1998).

The Court notes that there is apparently an issue between the parties
as to whether any part of Count One remains to be resolved.

1 Background²

2 Defendant J & J Rocket Company dba JP Consultants (“JP Consultants”) is
3 a consulting company that provides training, teaching and coaching on various
4 leadership topics; its principal is Jo Ann Panke. JP Consultants had a contract with
5 the Center for Drug Evaluation and Research (“CDER”), a subunit of the United
6 States Food and Drug Administration (“FDA”), to provide a leadership course
7 curriculum called Preceptor for a Change (“PAC”). The PAC curriculum was taught
8 to separate consecutive small groups of students referred to as Cohorts. In October
9 2010, JP Consultants, through Panke, entered into a Professional Services
10 Agreement (“PSA”) with plaintiff Deborah Caldwell, an experienced professional
11 instructor and coach, whereby she was to work as an independent contractor for a
12 one-year period providing instruction services to JP Consultants’ clients; the PSA
13 provided that it was to be construed and interpreted under Arizona law. The primary
14 work done by Caldwell was teaching and coaching the PAC course at CDER. The
15 PSA recognized that Caldwell’s work with the PAC program would bring her into
16 contact with JP Consultants’ clients, clients’ employees and management.

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19 The facts relevant to the breach of contract claim referred to in this
20 section are those that the Court deems to be undisputed based on the parties’
21 statements of facts.

22 The Court notes that in reviewing Defendant’s Controverting Statement
23 of Facts in Opposition to Plaintiff’s Motion for Summary Judgment on Count Two
24 (“CSOF”) (Doc. 40), it discovered that JP Consultants at some point, apparently
25 around its responses to Caldwell’s Statement of Facts (“SOF”) 35-37 (Doc.37)
26 inadvertently left out a response to one of Caldwell’s statement of facts, thus leading
 it to misnumber its remaining controverting responses (numbers 37-63), e.g. JP
 Consultants’ CSOF 37, which is supposed to be a response to Caldwell’s SOF 37,
 is actually JP Consultants’ response to the Caldwell’s SOF 38. The Court has taken
 JP Consultants’ numbering mistakes into account in determining which of Caldwell’s
 statements of fact JP Consultants does not controvert.

1 After the PSA ended by its own terms in October 2011, Caldwell continued
2 teaching the PAC cohorts at CDER for JP Consultants despite the lack of any written
3 contract. On August 27, 2012, Panke emailed Caldwell a new draft agreement for
4 her signature because Panke desired Caldwell to continue her relationship with JP
5 Consultants. On September 5, 2012, Caldwell sent Panke an email rejecting the
6 draft agreement and proposing a revised agreement. On September 7, 2012, Panke
7 notified Caldwell through an email that she was rejecting Caldwell's counteroffer and
8 that JP Consultants was terminating its relationship with her in October 2012. That
9 same day, Panke sent an email to Janice Newcomb, the director of CDER's Office
10 of Executive Programs Division of Training and Development, informing her that
11 Caldwell was leaving JP Consultants in order to pursue her own independent
12 contacts; at that time, Panke intended that Caldwell's last day at CDER would be
13 October 26, 2012, and she then believed that it was permissible for Caldwell to seek
14 independent consulting contracts outside of CDER and JP Consultants' current client
15 pool.

16 On September 9, 2012, Panke sent Caldwell a formal notice of termination.
17 The termination letter gave Caldwell eight weeks notice of termination because
18 Panke did not believe she then had cause to terminate Caldwell notwithstanding her
19 suspicions that Caldwell, without Panke's knowledge or permission, had been
20 improperly communicating for several weeks directly with both Janice Newcomb and
21 Virginia Giroux, CDER's deputy director for training, that Caldwell was improperly
22 withholding information from Panke, and that she had been communicating about
23 competing with JP Consultants. Panke's suspicions regarding Caldwell's
24 communications were based solely on her perception of the breakdown in
25 communications between her and Newcomb and how Newcomb and Giroux were
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1 treating her at that point and not on anything anybody had told her about any
2 improper communications on Caldwell's part with Newcomb and Giroux.

3 Although she no longer had a written contract with JP Consultants, Caldwell
4 began teaching and coaching PAC Cohort 9 at CDER for JP Consultants in
5 September 2012. Despite her continuing suspicions about disloyalty on Caldwell's
6 part, Panke approached Caldwell on October 10, 2012 about the possibility of
7 Caldwell continuing to work for JP Consultants through the completion of PAC
8 Cohort 9, and on October 18, 2012, Panke sent Caldwell a draft contract. Caldwell
9 made a final counteroffer to JP Consultants on October 22, 2012. On October 23,
10 2012, Panke sent Caldwell an email stating that she would agree to have Caldwell
11 finishing teaching and coaching PAC Cohort 9 with the specific compensation terms
12 that Caldwell had proposed the day before³; Panke added a term to the effect that
13 Caldwell was to act with a high degree of professionalism.⁴ Later that same day,
14 Caldwell emailed Panke that "[w]e are in agreement that I will finish PAC C9 which
15 ends in June 2013." Both parties believe that the October 23rd emails constituted
16 a binding agreement.

17 On January 8, 2013, Caldwell and Panke had a meeting regarding the status

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19 Panke's email stated in relevant part that "[i]n the best interests of the
20 PAC program, I will agree to have you finish teaching and coaching PAC C9. In
21 exchange for your work, I will compensate you at \$1,500/day, \$125/day per diem
and \$500/month airfare."

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23 What Panke stated in her email regarding professionalism was:

24 As you continue to be a representative of JP Consultants while working
25 at CDER I trust you will conduct yourself in the same professional
26 manner as you have shown in the past. I also trust that you will
continue to deliver the PAC C9 program with the same high level of
instruction.

1 of the PAC Cohort 9 that Caldwell was still teaching for JP Consultants; during that
2 meeting, Caldwell informed Panke that she was looking into working with several
3 FDA sub-organizations other than CDER. On January 13, 2013, Panke sent
4 Caldwell a letter claiming that she was prohibited from competing with JP
5 Consultants until at least November 2014. Panke included the November 2014 date
6 because it was three years after the expiration of the October 2010 PSA which
7 contained a three-year non-compete provision. Panke informed Newcomb and
8 Giroux at CDER that Caldwell could not perform any program instruction for FDA-
9 related agencies on her own until October 2014.

10 Caldwell filed this action on March 4, 2013. The single claim in the original
11 complaint sought to have the three-year non-compete provision in the expired PSA
12 declared unenforceable.⁵ When Panke learned the next day that Caldwell had sued
13 JP Consultants, she decided to terminate Caldwell. Early on March 9, 2013, Panke
14 telephoned Giroux to inform her that Caldwell's relationship with JP Consultants was
15 being terminated as a result of her lawsuit. Later that same day, Panke emailed a
16 termination notice to Caldwell; the notice informed Caldwell that her services were
17 no longer needed by JP Consultants "effective immediately" and that the non-
18 compete provision of the October 2010 PSA survived her termination and would be
19 enforced. On April 4, 2013, Caldwell filed an amended complaint in this action
20 adding a breach of contract claim based on JP Consultants' early termination of the
21 parties' October 23, 2012 email agreement. JP Consultants, while raising affirmative
22 defenses, has not filed a counterclaim against Caldwell for breach of contract or for

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24 In an order entered on July 2, 2013, the Court granted Caldwell's Motion
25 for Partial Judgment to the extent that the Court declared that the three-year non-
26 compete covenant in the parties' October 12, 2010 PSA was unenforceable under
Arizona law.

1 breach of the implied covenant of good faith and fair dealing.

2 Discussion

3 Caldwell has moved for summary judgment on her breach of contract claim.
4 In order to prove her claim, she has the burden of establishing the existence of a
5 contract, its breach, and resulting damage. Graham v. Asbury, 540 P.2d 656, 657
6 (Ariz.1975). The Court concludes that Caldwell has met her initial burden of proof
7 in that JP Consultants does not dispute that the parties entered into a binding email
8 contract in October 2012, that its termination of Caldwell in March 2013 was prior to
9 the June 2013 expiration of the parties' email agreement, and while JP Consultants
10 disputes that it owes Caldwell any damages, it does not controvert Caldwell's
11 contention that she lost the amount of \$31,100 as a result of JP Consultants' early
12 termination of the parties' contract.

13 Since Caldwell has furnished undisputed proof of the parties' contract and the
14 fact of her dismissal, the burden is on JP Consultants to prove its affirmative defense
15 that it terminated Caldwell's services for cause because she breached the parties'
16 October 2012 email agreement. See Palicka v. Ruth Fisher School District No. 90
17 of Maricopa County, 473 P.2d 807, 811 (Ariz.App.1970) (In an action by a teacher
18 suing the school board for breach of contract, the court, relying on "the general rule
19 that the party asserting the affirmative of an issue has the burden of proving it[,],"
20 stated that "after the teacher had established her teaching contract and the fact of
21 dismissal, both of which the Board admitted, the burden of establishing good cause
22 as a defense rested with the Board.") JP Consultants' specific allegation as to this
23 affirmative defense, as set forth in its First Amended Answer to First Amended
24 Complaint (Doc. 29), and reiterated in its CSOF 83 and in its response to Caldwell's
25 summary judgment motion, is that Caldwell "violated her express and implied
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1 obligations under the Agreement, including her duty of good faith and fair dealing,
2 by acting disloyally and insubordinate as a result of her efforts to repudiate her
3 contractual obligations to Defendant, and her efforts to compete against and take
4 clients - namely CDER and IHS - of JP Consulting [sic].”

5 The issue before the Court is whether JP Consultants has submitted evidence
6 of sufficient quantum and quality to create a genuine issue of material fact as to
7 whether Caldwell’s conduct after the formation of the October 2012 email agreement
8 justified her termination because it amounted to a material breach of certain
9 expressed and implied duties owed to JP Consultants pursuant to the parties’ email
10 agreement and the covenant of good faith and fair dealing implied in that agreement.
11 Zancanaro v. Cross, 339 P.2d 746, 750 (Ariz.1959) (“Ordinarily the victim of a minor
12 or partial breach must continue his own performance, while collecting damages for
13 whatever loss the minor breach has caused him; the victim of a material or total
14 breach is excused from further performance.”); Murphy Farrell Development, LLLP
15 v. Sourant, 272 P.3d 355, 364 (Ariz.App.2012) (“[A]n uncured material breach of
16 contract relieves the non-breaching party from the duty to perform and can discharge
17 that party from the contract.”) Under Arizona law, a material breach of a contract
18 occurs when (1) a party fails to perform a substantial part of the contract or one or
19 more of its essential terms or conditions, or (2) when it fails to do something required
20 by the contract which is so important to the contract that the breach defeats the very
21 purpose of the contract. Dialog4 System Engineering GmbH v. Circuit Research
22 Labs, Inc., 622 F.Supp.2d 814, 822 (D.Ariz.2009). Similarly, under Arizona law, a
23 party breaches the covenant of good faith and fair dealing by denying the other party
24 the reasonably expected benefits of the contract. FL Receivables Trust 2002-A v.
25 Arizona Mills L.L.C., 281 P.3d 1028, 1037 (Ariz.App.2012). Caldwell argues, and the
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1 Court agrees, that JP Consultants has not met its burden of showing that Caldwell
2 breached her express or implied duties arising from the October 2012 contract in any
3 material manner.⁶

4 The parties agree that Caldwell's relationship to JP Consultants was one of
5 agency as an independent contractor, and as such she owed JP Consultants a
6 fiduciary duty, which included a duty of loyalty. See McCallister Co. v. Kastella, 825
7 P.2d 980, 982 (Ariz.1992) ("[I]n Arizona, an employee/agent owes his or her
8 employer/principal a fiduciary duty.")

9 A. Duty Not to Compete With JP Consultants

10 JP Consultants argues that Caldwell's conduct violated her duty of loyalty in
11 several aspects as a result of her endeavors to remain in the same teaching and
12 coaching business after the end of PAC Cohort 9, *i.e.*, that she violated her duty not
13 to compete with JP Consultants while working for it, that she violated her duty to
14 keep JP Consultants informed of its business opportunities, and that she violated her
15 duty to act for JP Consultants' benefit and not her own.

16 Given her duty of loyalty, Caldwell was precluded from actively competing with
17 JP Consultants concerning the subject matter of her agency while working for it. *Id.*
18 She was, however, clearly permitted by Arizona law to take action during the period
19 of her agency to prepare for competing with JP Consultants after the termination of
20 her agency relationship with it, so long as that preparation did not take the form of
21 acts directly competing with JP Consultants. *Id.*, at 982-83; Taser International, Inc.
22 v. Ward, 231 P.3d 921, 926 (Ariz.App. 2010).

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25 None of JP Consultants' arguments concerning Caldwell's conduct are
26 directed at the manner in which she taught and coached the PAC course at CDER
and there is no evidence that she did not do so competently in compliance with her
contract with JP Consultants.

1 In its basically conclusory arguments that Caldwell improperly solicited for
2 work in competition with it prior to being terminated, JP Consultants relies on its
3 CSOF 78, which, referencing Caldwell's deposition, states *in toto*: "Caldwell emailed
4 or called at least four individuals at either CDER or NIH to 'gauge interest' in having
5 Caldwell perform instruction services apart from JP Consultants. [Ex. 17 at 76, Ins.
6 7-23; 78, Ins. 8-14; 79[,] Ins. 8-24; 81 In. 4 to 82. In. 18]."⁷ JP Consultants does not,
7 however, set forth in its statements of facts or in its response who these individuals
8 were or what Caldwell communicated to them. That information, however, is crucial
9 because the determination of the line separating mere preparation from active
10 competition depends on the nature of the preparations to compete. Taser
11 International, 231 P.3d at 926.

12 According to the specific deposition citations noted, but not set forth, by JP
13 Consultants, it is relying on the following testimony by Caldwell to support its
14 defense that she was properly terminated due to her pre-termination attempts to
15 compete with it: (1) that prior to her termination, Caldwell emailed Mr. Pucino, who
16 used to work at the National Institutes of Health, to find out if he knew someone at

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19 The Court notes that in determining whether JP Consultants has
20 submitted evidence of a sufficient caliber and quantity to support a verdict in its favor
21 on its affirmative defense, the Court has relied on those portions of the submitted
22 evidence specifically cited to by the parties in their statements of facts. See Keenan
23 v. Allan, 91 F.3d 1275, 1279 (9th Cir.1996) (noting that it is not the district court's task
24 to "scour the record in search of a genuine issue of triable fact" since it is the
25 obligation of the nonmoving party "to identify with reasonable particularity the
26 evidence that precludes summary judgment.")

Because neither party has objected to their introduction, the Court also notes
that it has considered the portions of Panke's and Caldwell's depositions specifically
cited to by the parties notwithstanding that neither party has properly authenticated
those depositions. See Orr v. Bank of America, NT & SA, 285 F.3d 764, 773-74 (9th
Cir.2002).

1 NIH that Caldwell “might contact there to gauge interest” because she “was getting
2 information so that [she] could prepare to see if there was an opening where [she]
3 might make a marketing call, but [she] had not made one[;]” (2) that Caldwell
4 emailed Marjorie Shapiro, a former student who was a leader in a PAC cohort prior
5 to Cohort 9, to make a request similar to the one that she made to Pucino; (3) that
6 at some point in March 2013, Caldwell telephoned Donna Lipscomb, one of the
7 names given to her by Shapiro, and left a message but never spoke to her, and that
8 the purpose of her call was “[t]o inquire if they currently ran a leadership program or
9 team program[;]” and (4) that at that point in time she made phone calls or sent
10 emails to other people “along the same lines” as she described for Lipscomb.

11 The Court is not persuaded that JP Consultants has met its burden of showing
12 that there is a disputed issue of material fact as to this aspect of its affirmative
13 defense inasmuch as it fails to discuss in its response, and thus fails to provide any
14 cogent argument supported by legal authority, how any of this limited evidence
15 amounts to something other than legally permissible preparations to compete by
16 Caldwell, *i.e.*, how this evidence sufficiently establishes that Caldwell was soliciting
17 work as opposed to seeking information about future work. JP Consultants does not
18 cite to any evidence that Caldwell, prior to her termination, directly solicited as a
19 future client any entity that JP Consultants currently had a contract with or any entity
20 that it had an interest in obtaining as a client, or that she even learned of any
21 business opportunity that she might obtain to compete with JP Consultants. For
22 example, while JP Consultants has cited to Caldwell’s testimony that she sought to
23 obtain some contact information at NIH prior to her termination, there is no evidence
24 of record that NIH was a client of JP Consultants or that it was interested in obtaining
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1 NIH as a client.⁸

2 JP Consultants also relies on its uncontroverted CSOF 79, wherein it cites to
3 Caldwell's testimony that she did not believe that she had a contractual or legal
4 obligation to refrain from competing with JP Consultants during the time she was
5 teaching Cohort 9. The Court is also not persuaded that Caldwell's cited testimony
6 amounts to significant probative evidence that she materially breached the October
7 2012 email agreement because her testimony was based on her understanding as
8 a layperson that the agreement did not contain a provision banning competition and,
9 more importantly, because JP Consultants does not provide any cogent argument
10 as to why Caldwell's claimed ability to compete with it amounts to evidence that she
11 actually competed with it or even attempted to compete with it in a way that
12 materially breached the parties' agreement.

13 B. Duty of Professionalism

14 JP Consultants also contends in its response that Caldwell breached her duty
15 of loyalty and her contractual duty of professionalism by disclosing too much
16 information to CDER-related personnel, *i.e.*, "she exceeded her contractual terms
17 by disclosing more information to CDER than agreed, and by disclosing her
18 termination to those who had no reason to be in the loop."⁹

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21 The Court notes that NIH is not mentioned in JP Consultants' affirmative
22 defense, which states that Caldwell violated her duty not to compete by her efforts
23 to take CDER and IHS [Indian Health Service] as her own clients.

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25 JP Consultants' reliance on its uncontroverted CSOF 90, which cites to
26 Caldwell's testimony that she did not have a contractual duty of loyalty under her
understanding of the email agreement, does not amount to significant probative
evidence that she committed any disloyal acts while she was teaching Cohort 9,
much less that she materially breached her duty of loyalty.

1 Underlying JP Consultants' contention is its unsupported belief that Caldwell
2 contractually agreed to limit her communication to JP Consultants' clients according
3 to her proposal in her October 22, 2012-email counteroffer to Jo Ann Panke. See
4 CSOF 70 ("In addition to agreeing to perform under the highest professional
5 standards, Caldwell further agreed to limit her communications to JP Consultants'
6 clients according to the terms of the agreement she proposed. [Ex. 17 at 54, Ins. 1-
7 4].") JP Consultants' contention is based ¶ 4 in Caldwell's counteroffer, wherein she
8 proposed:

9 4. I will tell Janice [Newcomb] (and anyone else whom I need to
10 inform) that we were not able to work out an agreement on other work,
11 so I will no longer be working under JP Consultants' contract other than
12 to complete teaching and coaching Cohort 9, and JP Consultants will
13 be making other arrangements for any other projects, and that she
14 should discuss that with you.

15 This proposed term, however, did not become part of the parties' email agreement
16 because Panke did not include that part of Caldwell's proposal in her October 23,
17 2012 responsive email wherein she, on behalf of JP Consultants, agreed to
18 Caldwell's financial terms for completing Cohort 9. Panke's deposition testimony
19 makes it clear that she intentionally did not accept all of the terms proposed in
20 Caldwell's October 22nd counteroffer and what terms she did not accept she left out
21 of her October 23rd acceptance email (Panke's depo., Pltf's Ex.2, at 57 In. 24 to 58
22 In. 19), and Panke specifically stated in this regard that she "did not agree to
23 [Caldwell's] number 4." (Panke's depo. at 59, Ins. 21-22). For this reason, JP
24 Consultants' arguments that Caldwell's communications to Janice Newcomb and
25 other CDER employees, such as Brenda Pillari (CSOF 77, noting Caldwell's
26 deposition testimony that Pillari as not a CDER employee who needed to know
about Caldwell's job status) "far exceeded her contractual authority" are unsupported
to the extent they are based on Caldwell's proposed ¶ 4 being a term of the parties'

1 contract.

2 JP Consultants also argues that Caldwell, through her communications with
3 Janice Newcomb concerning her contractual dispute with JP Consultants, violated
4 her duty of professionalism because she failed to maintain JP Consultants' friendly
5 relationship with CDER. While there is evidence from Jo Ann Panke that her
6 relationship with Newcomb deteriorated prior to Caldwell's termination, JP
7 Consultants does not cite to, or even discuss, any non-speculative evidence in the
8 record that Caldwell's conduct was responsible for any rift between JP Consultants
9 and CDER. The evidence of record specifically cited to by Caldwell, and admitted
10 by JP Consultants, is that Panke merely suspected that her deteriorating relationship
11 with Newcomb was due to Caldwell's communications with Newcomb and Virginia
12 Giroux at CDER, and that no one connected to CDER informed her that Caldwell
13 had made any negative comments about JP Consultants or that any of Caldwell's
14 communications with them adversely affected CDER's relationship with JP
15 Consultants. See Caldwell's uncontroverted SOF 60-62.¹⁰

16 But in any case, even if Caldwell's comments to CDER employees about the
17 status of her relationship with JP Consultants and her desires to continue teaching
18 and coaching courses similar to the PAC course amounted to disloyal or

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21 For example, Caldwell's SOF 62, which JP Consultants specifically
admitted in its misnumbered CSOF 61, states:

22 Neither Ms. Giroux, Ms. Newcomb nor anyone else from CDER ever
23 told Ms. Panke that Ms. Caldwell said anything negative about JP
24 Consultants or that Ms. Caldwell made any proposal or suggestion that
she replace JP Consultants as a consultant to CDER. [Panke Dep.,
25 Exh. 2, at 80:1-9.] Ms. Panke never even asked Ms. Newcomb or Ms.
26 Giroux whether Ms. Caldwell had engaged in any such communication.
[Panke Dep., Exh. 2, at 48:3-13,]

1 unprofessional acts contrary to her duty of loyalty to JP Consultants, JP Consultants
2 has failed to discuss, and certainly has not established, how these acts amounted
3 to a material breach of Caldwell's express or implied duties arising from the October
4 2012 agreement.


5 While normally the issue of whether a fiduciary duty of loyalty has been
6 breached is a question of fact to be determined by the trier of fact, McCallister Co.
7 v. Kastella, 825 P.2d at 984, JP Consultants, as the party with the burden of proof
8 on this issue, has the obligation to submit more than a "scintilla of evidence" in
9 support of its affirmative defense because evidence that is "merely colorable" or "not
10 significantly probative," as is the case here, is not sufficient to present a genuine
11 issue of material fact for the trier of fact to resolve. Anderson v. Liberty Lobby, Inc.,
12 477 U.S. 242, 254 (1986); Nelson v. Pima Community College, 83 F.3d 1075, 1081-
13 82 (9th Cir.1975) ("The mere existence of a scintilla of evidence is not enough to
14 create a genuine issue of material fact in order to preclude summary judgment.
15 Likewise, mere allegation and speculation do not create a factual dispute for
16 purposes of summary judgment.") (internal quotation marks and citations omitted).
17 The Court, without weighing the evidence and without making any credibility
18 determinations, concludes as a matter of law that the evidence specifically relied on
19 by JP Consultants and the justifiable inferences arising from that evidence, all
20 viewed in JP Consultants' favor, is simply insufficient to create a triable issue as to
21 whether Caldwell, prior to her termination, materially breached any express or
22 implied duty owed to JP Consultants. See McCallister Co., at 985 (Court granted
23 summary judgment to employee sued for breach of the duty of loyalty because the
24 evidence presented by the employer failed to raise a factual issue that the employee,
25 while still employed, had attempted to solicit the employer's clients or employees so
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1 that she could start a rival business.) Therefore,

2 IT IS ORDERED that Plaintiff's Motion for Summary Judgment on Count Two
3 (Doc. 36) is granted.

4 IT IS FURTHER ORDERED that the parties, after reasonable consultation,
5 shall no later than October 31, 2014, file either a joint report setting forth what
6 remains to be decided in this action and a proposed schedule for resolving the
7 remainder of the action, or a stipulation dismissing any remaining claims or issues
8 and a proposed form of judgment.

9 DATED this 30th day of September, 2014.

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12 Paul G. Rosenblatt
United States District Judge
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